

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:)
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WESTEL SAMOA, Inc.)
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)
For Broadband Block C Personal)
Communications Services Facilities)
)
and)
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WESTEL, L.P.)
)
)
For Broadband Block F Personal)
Communications Services Facilities)
)
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WT Docket No. 97-199

File No. 00560-CW-L-96

File Nos. 00129-CW-L-97
00862-CW-L-97
00863-CW-L-97
00864-CW-L-97
00865-CW-L-97
00866-CW-L-97

To: The Commission

CLEARCOMM'S OPPOSITION TO MOTION TO CONSOLIDATE

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OPPOSITION TO MOTION TO CONSOLIDATE

ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, by its attorneys and pursuant to Section 1.45 of the Commission's rules, hereby opposes, to the extent set out below, the Motion to Consolidate filed by Anthony T. Easton ("Easton").¹

INTRODUCTION AND SUMMARY

ClearComm opposes the Motion to Consolidate as procedurally inappropriate. First, the Motion's request for relief is unclear. Second, assuming Easton seeks to consolidate the three subject pleadings for hearing, ClearComm opposes the Motion because there are no hearings to consolidate. The only hearing designated is Westel's and that proceeding is not even included in the Motion. Assuming, arguendo, that the procedural defects could be

¹ Motion to Consolidate of Anthony T. Easton in the Matter of Anthony T. Easton, WT Docket No. 97-199 (filed February 11, 1998)(the "Motion"); this Opposition is timely filed. 47 C.F.R. § 1.45(a).

corrected, the apparent basic assumption underlying the Motion is simply wrong: the three pleadings at issue do not address the same legal and factual matters. The Easton HDO Petition solely addresses Easton's jurisdictional and due process claims arising under the HDO. In contrast, the ClearComm Application for Review argues that the Presiding Officer erred in denying ClearComm intervention in the Westel hearing. Finally, the Easton NAL Petition addresses only the standing of the Easton Trust and the appropriateness of ClearComm's changes in ownership structure. In light of these distinct legal and factual issues, consolidation is inappropriate.

I. Easton's Ambiguous Request for Relief Should Be Dismissed or Denied.

It is unclear precisely what relief the Easton interests seek. On its face, the Motion seeks consolidation "pursuant to sections 1.41 and 1.227(a)(1) of the Commission's Rules" of three pending "matters for disposition": (1) ClearComm's Application for Review of the denial of its Petition to Intervene in the Westel hearing (ClearComm Application for Review); (2) the Easton Petition for Reconsideration of the Westel hearing designation order (Easton HDO Petition); and (3) the Easton Petition for Reconsideration of the PCS 2000 Notice of Apparent Liability and Memorandum Opinion and Order (Easton NAL Petition).

If by this Easton intends to suggest that the Commission contemporaneously consider the three matters, ClearComm has no particular objection to that approach although it sees no particular advantage either.² As described below, however, the three matters are

² There is one procedural aspect of the three pleadings that may require Commission attention. Initially, ClearComm sought expedited consideration of its Application to ensure the Westel hearing would not proceed without ClearComm's participation. Subsequently, the Deputy General Counsel issued his decision to stay the Westel hearing pending resolution of the Easton Petition -- an act that rendered

(...Continued)

separate and provide no basis for consolidation.

Likewise, if Easton seeks to impel the Commission to rule on the Easton NAL Petition, ClearComm has no objection. In this regard, ClearComm urges the Commission -- as it has in the past -- to promptly deny the Easton NAL Petition in all respects.³

However, if Easton intends by his current pleading to suggest that the Commission initiate some conglomerate proceeding before an administrative law judge to inquire not only into Easton's qualifications to be a licensee and ClearComm's right to intervene in the Westel hearing but also the matters at issue in the Easton NAL petition, then ClearComm unequivocally disagrees. As detailed below, such a proceeding is unnecessary, unwarranted and clearly inconsistent with established Commission procedure.

As an initial matter, the Motion mischaracterizes ClearComm's position on various issues:

- *First*, ClearComm is not motivated, as Easton states, by a "transparent concern that the PCS 2000 NAL findings will not survive the *Westel Samoa* hearing" because of "new evidence uncovered in discovery."⁴ To the contrary,

ClearComm's stay request temporarily moot. If the Commission ultimately lifts the current Westel stay without acting on ClearComm's Application, then ClearComm's Petition for Stay should be immediately considered.

³ See Opposition of PCS 2000, L.P. to Petition for Reconsideration, FCC File Nos. 00414-CW-L-96 et al., at 1-2 (filed Mar. 6, 1997).

⁴ Motion at 4; While Easton refers elliptically to "new evidence uncovered in discovery," Easton points to absolutely nothing in the factual record developed so far in the Westel proceeding which undermines the Commission's previous conclusions. Ironically, Easton vigorously challenged any attempt to conduct discovery with regard to his actions in the immediate aftermath of the bidding error. Indeed, he moved the presiding officer for a protective order specifying that "[t]he Bureau should not be allowed to inquire into matters pertaining solely to Mr. Easton's representations to the Commission concerning the overbid." See Motion for Protective Order, WT Docket No. 97-199, at 13 (filed Nov. 6, 1997). The motion was denied although the ALJ noted that, given that the misrepresentation/lack of candor issue towards Easton had been severed from the

(...Continued)

ClearComm is aware of no evidence that undermines the Commission's findings with regard to Mr. Easton.

- *Second*, ClearComm's interest in these continuing proceedings is quite simple: Because the Commission's findings in the MO&O and NAL form the basis for the Commission's decision to license ClearComm⁵ and because ClearComm is currently engaged in litigation on several fronts with various Easton interests,⁶ ClearComm, as one of the primary victims of Easton's actions, has a vital and

proceeding, "the deposition of Easton should focus primarily on his relationships, communications and contacts with Breen, his cognizance of Breen's actions, inactions and conduct, his knowledge of the state of Breen's knowledge, and matters of similar import." See Memorandum Opinion & Order, WT Docket No. 97-199, at ¶ 5 (rel. Nov. 19, 1997). Even so, at his deposition, Easton's counsel advised him not to answer any questions that would go to his actions immediately after the discovery of the bidding error, specifying "Mr. Easton is here to testify about Mr. Breen's involvement with the bid on the 23rd. I would like to restrict the questions to that time." See Deposition of Anthony Terry Easton, WT Docket No. 97-199, at 21 (Dec. 19, 1997). It should also be noted that ClearComm was denied an opportunity to participate in this discovery process since the Presiding Officer denied ClearComm party status for that purpose.

⁵ The Commission specifically cited the ouster of the Easton interests as a condition precedent to the Commission's finding that grant of ClearComm's fifteen applications for broadband C block PCS licenses, as amended to reflect a transfer of control pursuant to a Section 24.823(g)(3) waiver, was in the public interest. See *Applications of PCS 2000, L.P. for Broadband Block C Personal Communications Systems Facilities*, 12 FCC Rcd 1681, 1682 (1997) ("MO&O") ("Because PCS 2000 has removed all individuals who may have been responsible for the misrepresentations from its organization, we conclude that PCS 2000's applications, as amended, may be granted."); *Applications of PCS 2000, L.P. for Broadband Block C Personal Communications Systems Facilities*, 12 FCC Rcd 1703, 1703 (1997) ("NAL") ("PCS 2000 has purged from its organization all individuals who took part in [the misrepresentations], and as explained in a companion item, we are therefore persuaded that PCS 2000 will meet our expectations of a qualified licensee."). Indeed, part of the relief that the Easton interests seek in asking the Commission to reconsider the NAL is that the FCC "change[] the grounds on which PCS 2000 was granted its exemption under 47 C.F.R. § 24.823(g)(3) and that the Commission determine that "PCS 2000's change in ownership was not legally necessary []or material to a determination of its fitness to be a licensee". See *Petition for Reconsideration*, FCC File Nos. 00414-CW-L-96, et al. at v (filed Feb. 21, 1997) ("Easton NAL Petition").

⁶ See *Jack H. Elliot v. Unicom Corp.*, No. 399370 (Cal. Sup. Ct. filed Jan. 27, 1997) (The action has been dismissed on grounds of *forum non conveniens* but is expected to be refiled in Puerto Rico); *PCS 2000, L.P., et al. v. Romulus Telecommunications, Inc.; Anthony T. Easton et al.*, Civ. No. KAC96-07 (803) (Commonwealth of Puerto Rico, Superior Court of San Juan).

continuing interest in any Commission proceeding – whether the proceeding is specifically directed at Easton or not – in which a collateral review of those findings is likely to take place.

- *Third*, because the relevance of the facts underlying the Commission’s *NAL* to the Westel hearing remain unclear,⁷ ClearComm had no choice but to seek to intervene in the Westel case. Indeed, it is ClearComm’s intent to seek to vigorously defend its position and the Commission’s findings in *any* proceeding in which Easton’s conduct is deemed relevant.

II. Consolidation is Inconsistent With The Requirements of Section 1.227.

Under Section 1.227(a)(1), “[t]he Commission, upon motion . . . will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: (1) Any cases which involve the same applicant or involve substantially the same issues. . . .” This section appears in Subpart B of the Rules which addresses “Hearing Proceedings.” For the reasons set forth below, the Motions should be dismissed or denied.

First, Section 1.227 contemplates that there are hearing cases to consolidate. Yet, here none of the “three matters” is a hearing case. In fact, there is only one hearing designated at this time -- Westel’s -- but the Westel hearing is not even among the “three matters” that the Motion to Consolidate addresses. Even assuming that the Motion intends to include the Westel hearing, there is simply no other hearing designated by the Commission to consolidate with Westel’s. While ClearComm’s Application for Review addresses Westel hearing issues, neither the Easton *NAL* Petition nor the Easton *HDO* Petition addresses the Westel hearing or any other hearing that the Commission has

⁷ See Application for Review, WT Docket No. 97-199, at 2-3 (filed Jan. 26, 1998) (Noting that the Presiding Officer has not yet determined whether the facts as

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designated. Absent multiple hearings, there is nothing to consolidate under 47 C.F.R.

1.227(a). On this basis alone, the Motion to Consolidate should be dismissed as procedurally defective or otherwise denied.

Second, if Easton truly intends to say that the issues contained in the ClearComm Application for Review, the Easton HDO Petition, and the Easton NAL Petition should be consolidated for an evidentiary hearing, the Motion likewise should be dismissed or denied. The thought that Mr. Easton would now seek a hearing on the Easton HDO Petition is truly ironic. Easton is not now in hearing for the sole reason that he denied that the Commission had jurisdiction and refused to appear at the show cause hearing the Commission designated against him last fall. Thus, unless the Easton Motion to Consolidate is intended to act as a withdrawal of the Easton HDO Petition and an admission of jurisdiction, there can be nothing to consolidate. It would be a fruitless exercise for the Commission to grant a motion to consolidate submitted by a movant who refuses to appear and denies the Commission's jurisdiction.

Moreover, only if the Commission determines that Mr. Easton deserves yet another opportunity for hearing -- which ClearComm believes he has waived⁸ -- should the Commission compare the designated issues regarding Mr. Easton and Westel to determine whether consolidation is appropriate.

In any event, as detailed below, the grounds for a consolidation of any case for

determined in the *PCS 2000 NAL* will govern the Westel proceeding or if those facts will be relitigated).

⁸ See Comments of ClearComm, L.P., WT Docket No. 97-199, at 2 (filed Nov. 21, 1997) (Supporting the argument of the Wireless Telecommunications Bureau's Opposition to Petition for Reconsideration that Easton has waived his right to a hearing).

hearing with the Easton NAL Petition are non-existent. The Easton NAL Petition did not raise factual issues, nor did it request a Commission hearing -- nor has the Commission indicated that a hearing is warranted. To the contrary, the Easton NAL Petition was filed more than one year ago and addressed purely legal issues related to the Easton Trust's standing within PCS 2000: (a) the Trust's standing before the Commission, (b) the existence of an ownership interest by Easton and (c) the imputation of misconduct to Easton's wife.⁹ The Easton interests have never asked for an evidentiary hearing on these legal issues, the Commission has never indicated that a hearing is warranted to resolve these issues,¹⁰ and Easton does not now explain why such an evidentiary hearing is necessary or even useful.

Because the Motion attempts to consolidate a trio of pleadings that are procedurally out of sync there is no basis for consolidation under Section 1.227(a)(1).

III. Easton's Assertion of a Relationship Between the Three Underlying Pleadings Is Misguided.

The Motion argues that ClearComm's Application, Easton's HDO Petition and Easton's NAL Petition are linked because each of the parties to these pleadings was adversely affected by a Commission decision allegedly based on "incomplete and insufficient evidence of wrongdoing" that led to a "manifest injustice."¹¹ Once again, the Motion overstates the case.

⁹ See Easton NAL Petition, at v.

¹⁰ Indeed the Commission affirmatively declined requests for a hearing. See MO&O at ¶¶ 9, 36.

¹¹ Motion at 4.

Although Easton may characterize his HDO Petition as addressing “incomplete and insufficient evidence of wrongdoing,” the other pleadings he seeks to consolidate do not even address this issue. Certainly ClearComm’s Application for Review has nothing to do with “incomplete and insufficient evidence of wrongdoing” with regard to Easton; instead, the Application for Review is based on ClearComm’s belief that the Presiding Officer erred in denying ClearComm intervention in the Westel hearing. Similarly, the Easton NAL Petition does not focus on evidentiary questions but rather on the narrow issue of whether the SDE Trust should have been “squeeze[d] out” of ClearComm.¹² As set out in greater detail below, the divergent legal and factual issues addressed in these pleadings further undermines any claimed efficiencies from addressing these matters jointly.

A. The Easton HDO Petition Solely Addressed Alleged Violation of Due Process Rights and Jurisdictional Issues Raised by the Hearing Designation Order

In order to address the distinct issues raised by the Easton HDO Petition, it is necessary to reconstruct the procedural path of that pleading. In September of 1997, the Commission concurrently designated for hearing both the Westel applications and Anthony T. Easton.¹³ Specifically, the Commission sought to “[d]etermine, based on Anthony T. Easton’s misrepresentations before and lack of candor exhibited towards the Commission, whether Easton should be barred from holding Commission authorizations and participating

¹² The Easton NAL Petition acknowledges, in part, Mr. Easton’s role in the PCS 2000 bidding error.

¹³ *Id.* See *Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause*, FCC 97-322 (Sept. 9, 1997) (“HDO”).

in future Commission auctions.”¹⁴ Easton subsequently refused to appear,¹⁵ and instead filed a “Petition for Reconsideration” of the HDO that alleged deficiencies in the Commission’s jurisdiction and a violation of due process.¹⁶ It is this Petition that Easton now seeks to consolidate with the Easton NAL Petition and ClearComm’s Application.

As indicated above, the Easton HDO Petition claims that the Commission lacks jurisdiction even to conduct a hearing regarding Easton’s qualifications. However, as ClearComm and the Bureau have previously shown, jurisdiction over Easton exists for several reasons: (i) the plain language of the rules and Easton’s designation on ClearComm’s application make it clear that he was a “bidder” in the C-Block auction which subjected him to the prohibitions and potential penalties contained in 47 C.F.R. § 1.2109(d);¹⁷ and (ii) because the scope of Section 1.2109(d) includes company “principals,” as Easton was at the time of the wrongdoing. Additionally, Easton is subject to Commission jurisdiction because he is currently a FCC licensee. Easton’s interpretation of the Commission’s rules is simply inconsistent with their purpose -- to deal decisively with

¹⁴ *Id.* at ¶ 53.

¹⁵ *See* Letter to Presiding Judge Arthur I. Steinberg from attorney Russell D. Lukas, dated September 29, 1997.

¹⁶ *See* Anthony T. Easton’s Petition For Reconsideration, WT Docket No. 97-199 (filed Oct. 6, 1997) (“Easton HDO Petition”). ClearComm joins the Wireless Bureau in questioning the procedural propriety of the Petition. *See* Wireless Telecommunications Bureau’s Opposition to Petition for Reconsideration, WT Docket No. 97-199 at ¶ 3 (Oct. 16, 1997) (“Opposition”).

¹⁷ Section 1.2109(d) of the Commission’s rules states: “Bidders who are found to have violated...the Commission’s rules in connection with their participation in the competitive bidding...may be prohibited from participating in future auctions.”

“misconduct, misrepresentation or bad faith” in the auction process.¹⁸

In his HDO Petition, Easton also argued that his inclusion in the Hearing Designation Order had improperly denied him due process. Easton claimed he was “given *no opportunity* to adjudicate the issue of whether he acted intentionally or to otherwise challenge the outcome of the Commission’s investigation.”¹⁹ Easton later argued that he “reasonably believed . . . he would be given a better opportunity to challenge the Commission’s ‘conclusion’ that he engaged in intentional misconduct.”²⁰ Yet, Easton was offered multiple opportunities to participate in the *PCS 2000 NAL* and *PCS 2000 MO&O* and, in fact, submitted extensive materials in those proceedings. Further, Easton has declined to participate in the Westel Hearing Designation Order and therefore has voluntarily waived his rights to contest that Order. The Commission should not be forced to repeatedly thrust due process upon Easton, particularly in light of his efforts to pick and choose among these protections. Due to this voluntary waiver, the Commission is now free to take appropriate action against him.²¹

¹⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 2348, 2383 (1994) (Second Report & Order); In promulgating § 1.2109, the Commission specifically sought the power to “declare the applicant *and its principals* ineligible to bid in future auctions, and...take any other action that it may deem necessary....” *Id.*

¹⁹ HDO Petition, at 22-23 (emphasis added).

²⁰ Easton’s Reply to Wireless Telecommunications Bureau’s Opposition to Petition for Reconsideration, WT Docket 97-199, at ¶ 8 (Filed Oct. 24, 1997).

²¹ Easton also claims that the proper vehicle for assessing whether he engaged in intentional deception would have been a hearing conducted pursuant Section 309 of the Act. *See* HDO Petition, at 21. However, nothing in Section 309 required a hearing to establish Easton’s qualifications to serve as a Commission licensee in order for the

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B. The ClearComm Application Addresses ClearComm's Right to Intervene in the Westel Hearing

Unlike the Easton HDO Petition, the ClearComm Application solely addresses issues related to the Westel hearing.²² Specifically, ClearComm argues that the Presiding officer's denial of intervention is clearly erroneous in light of the direct relationship between the hearing issues and ClearComm. As illustrated by Westel's Motion for Summary Decision,²³ the Westel Presiding Officer has not established how the facts as determined in the *PCS 2000 NAL*²⁴ and *PCS 2000 MO&O* are to be applied in the Westel case. Also, the Presiding Officer has failed to adequately consider the range of issues related to ClearComm that may arise in this case. The lone subject of the Westel *HDO* is the conduct of Mr. Breen while an officer of ClearComm.²⁵ The Westel hearing, therefore, will focus on nothing other than the conduct of ClearComm and its former principals in the Round 11 PCS C-Block auctions. In the alternative, ClearComm urges acceptance of the Bureau's argument that ClearComm should be granted discretionary intervention because the company has "established that it has an interest in the proceeding" and demonstrated that it is "well able to assist in the discovery of evidence

Commission to grant ClearComm's applications. That process had to do with *ClearComm's* qualifications not *Easton's*.

²² Although there is no basis for consolidation, ClearComm did raise the pending Easton HDO Petition as a possible further basis for support of its stay request, but only in recognition of the fact that the ultimate disposition of the Easton HDO Petition may impact the Westel proceeding – apparently the same conclusion reached by the Deputy General Counsel when staying the Westel hearing.

²³ Motion for Summary Decision of Westel Samoa, Inc., Westel, L.P. and Quentin L. Breen, WT Docket 97-199, at 33-34 (filed Jan. 21, 1998).

²⁴ The *PCS 2000 NAL* found that Easton "intentionally misrepresented facts to the Commission and otherwise lacked candor in his dealings with the Commission." *PCS 2000 NAL* at ¶42.

²⁵ *HDO*, at ¶1.

of the events relevant to the designated issues.”²⁶

C. The Easton NAL Petition Relates Solely to the Standing and “Squeeze Out” of the Trust

As set out above, the Easton NAL Petition addresses only three legal issues: (1) the Trust’s standing,²⁷ (2) the Commission’s finding regarding Easton’s ownership interest, and (3) attribution of the misconduct to Easton’s wife.²⁸ These issues are completely independent of the Easton HDO Petition’s jurisdictional and due process claims and ClearComm’s efforts to intervene. Thus, there are no inherent advantages to contemporaneous consideration of the Easton NAL Petition with the other pleadings.

The thrust of the relief requested by the Easton interests dealt solely with the legal question of whether any wrongdoing by Easton could be imputed to the Easton Trust and, thus, whether Easton’s removal from the Company was “legally necessary”. The Easton NAL Petition never requested a hearing or other factual determination regarding Easton’s underlying misconduct.²⁹

²⁶ Wireless Telecommunications Bureau’s Comments in Support of Petition to Intervene, WT Docket No. 97-199, at ¶ 4 (filed Nov. 24, 1997); *see also Palmetto Communications Company*, 6 FCC Rcd 5023, 5024 (Rev. Bd. 1991) (Memorandum Opinion & Order) (party’s participation may help “sharpen up the evidence”).

²⁷ The Commission initially concluded that the Trust lacked standing to bring these claims. The FCC “conclude[d] that the Trust has failed to establish a caused nexus between the injury and the amended applications challenged here.” MO&O at ¶ 27.

²⁸ *See* Easton NAL Petition, at v; These consistent with the claims brought in the initial Petition to Deny by the SDE Trust. *See* MO&O, ¶ 6, 8.

²⁹ In fact, the Easton NAL Petition assumed the factual findings of the Commission:

Employee misconduct is remedied by an internal investigation and by the removal of the personnel judged responsible for the wrongdoing. PCS

(...Continued)

The merits of the Easton NAL petition essentially boil down to a debate regarding ClearComm's corporate decision to remove the Easton interests from the company. As ClearComm pointed out at the time, no ruling by the Commission could change the fact that the Easton interest in ClearComm has been removed. Moreover, the Easton Trust lacks standing before the Commission to even assert these claims; the Trust cannot demonstrate any causal nexus between its alleged injury and Commission action on ClearComm's applications. Put another way, the question of whether the corporate "squeeze out" of the Easton interest was appropriate was not for the FCC to decide.³⁰ Indeed, the Easton interests filed suit in California seeking to overturn removal of the Easton interests.³¹ What the NAL and MO&O did decide – and what the Petition does not substantively challenge – is that with the Easton interests expunged, no "substantial and material question of fact" would arise requiring designation of the ClearComm applications for hearing, and granting the licenses was in the public interest.

* * *

2000 was in full compliance with the Commission's character qualifications policy on February 19, 1996, when it secured Mr. Easton's resignation after receiving the report of the independent counsel who investigated the matter. By removing Mr. Easton from the management positions from which he could influence its conduct, PCS 2000 took all the remedial steps necessary to ensure its "future reliability and truthfulness" under the Commission's policy. There was no legal or logical reason for PCS 2000 to "squeeze out" the Trust.

Easton NAL Petition at iv.

³⁰ As the Commission determined, "[t]he Trust has failed to demonstrate how denial of the applications would result in the restoration of its interest." MO&O at ¶ 27.

³¹ See *Jack H. Elliot v. Unicom Corp.*, No. 399370 (Cal. Sup. Ct. Filed Jan. 27, 1997) (The action has been dismissed on grounds of *forum non conveniens* but is expected to be refiled in Puerto Rico).

As set forth above, the Easton HDO Petition, ClearComm's Application, and the Easton NAL Petition all involve distinct legal or factual issues that undermine any claimed benefits from consolidation. Indeed, the legal issues are so unique that even contemporaneous consideration would seem to only have marginal benefit. At least equally problematic are the obstacles to consolidation created by the procedural status of the three pleadings. Thus, for both procedural and substantive reasons, the Motion should be denied.

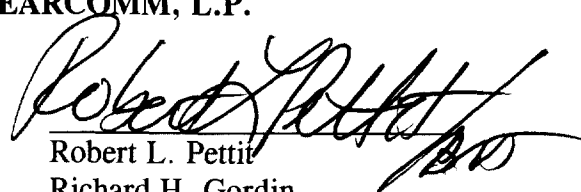
CONCLUSION

For the foregoing reasons, the Motion to Consolidate should be denied and the Commission should proceed with the orderly consideration of these issues as it sees fit.

Respectfully submitted,

CLEARCOMM, L.P.

By:

A handwritten signature in black ink, appearing to read "Robert L. Pettit", is written over a horizontal line.

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Dated: February 23, 1998

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I hereby certify that on this 23rd day of February, 1998, I caused copies of the foregoing "Opposition to Motion to Consolidate" to be hand-delivered to the following:

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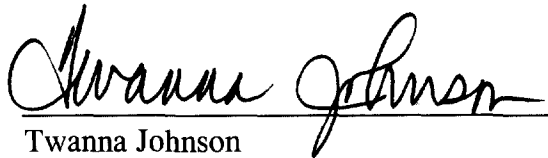
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